Huttig Sash and Door Company *and* Laborers' International Union of North America, Local Union No. 438, AFL-CIO. Case 10-CA-15705

September 20, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On April 29, 1982, Administrative Law Judge Sidney J. Barban issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member pannel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified herein.[2]

The Administrative Law Judge concluded, and we agree for the reasons stated in his Decision, that Respondent violated Section 8(a)(3) and (1) of the Act by discharging Tommy R. Benson on March 27, 1980. We find further support for this conclusion in the following facts which center around two incidents in which Benson was responsible for delivering doors and materials to muddy construction sites.

Both incidents occurred not long after the Board conducted an election in which the Union was designated by a majority of the votes cast and was certified as the employees' exclusive bargaining representative. In fact, the first incident, which involved a complaint by a customer that a number of doors which Benson and an assistant had delivered had been ruined because of mudstains, resulted in a written reprimand to Benson on March 7, 1980, only 1 day after he had acted as the observer for the Union in the election. Although, according to his testimony, Benson had handed the doors to the driver's assistant or "striker" from the rear of the truck and the striker carried them across the mud to the house in which they were to be installed, the assistant was not reprimanded.

The second incident occurred on March 27, when Benson and John Barnes were assigned to deliver a truckload of doors and trim to a muddy site. Benson testified that, because of the weight of the material, the condition of the ground, and the lateness of the day, the two agreed that they would need assistance to get the truck unloaded before dark. When Benson called the warehouse, however, Plant Manager Capito refused to send additional help. When Benson called Capito a second time after rechecking the site, Capito said, "You are in charge, totally in charge of the vehicle, and it's up to you to see to it that the material is delivered." When Benson and Barnes returned with the load undelivered, Capito terminated Benson.

[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. This matter was heard by Administrative Law Judge Robert Cohn, who died before he could issue a decision. By letter of October 13, 1981, Chief Administrative Law Judge Melvin J. Welles notified the parties of Administrative Law Judge Cohn's death and informed them of various alternatives for the disposition of the case, including designation of another administrative law judge to prepare a decision on the record as made, or a hearing *de novo* before another administrative law judge (see sec. 554(d) of the Federal Administrative Procedure Act and Sec. 102.36 of the Board's Rules and Regulations, Series 8, as amended). The parties agreed to waive a hearing *de novo*. The Board then assigned the matter to Administrative Law Judge Sidney J. Barban. Respondent now excepts to certain credibility findings, emphasizing that they were not based on the hearing demeanor of the witnesses. It is true that the normal weight accorded to credibility findings, *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), does not apply in circumstances such as those here. However, where the parties have waived their right to a hearing *de novo* and agreed to permit credibility resolutions, findings of fact, and conclusions of law to be determined by one who did not observe the demeanor of witnesses at the hearing, deference is due the Administrative Law Judge's credibility findings. In this case, we do not agree with Respondent's contention that the Administrative Law Judge's credibility findings were contrary to the preponderance of the evidence as established by the record as a whole.

Respondent has requested oral argument. This request is hereby denied as the record, the exceptions, and the brief adequately present the issues and positions of the parties.

In its exceptions to the Administrative Law Judge's Decision, Respondent contends that the Administrative Law Judge erroneously found that Plant Manager Capito admitted that James had been promised a wage increase. Our examination of the record reveals no direct admission by Capito. Apparently, the Administrative Law Judge was referring to the credited testimony of James that Capito told him that he knew that James had been promised a wage increase but that the presence of the Union in the meantime prevented Capito from giving it. Accordingly, in affirming the Administrative Law Judge we rely on the credited testimony of James and not on any direct admission by Capito.

In accord with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

[2] Although the Administrative Law Judge found that Respondent violated Sec. 8(a)(1) of the Act by withholding Rufus James' promised wage increase because of the employees' union activities and recommended that Respondent offer James immediate and full reinstatement, the Administrative Law Judge did not recommend that Respondent be ordered to take the afirmative action of awarding James his promised wage increase. We shall correct this omission, apparently an oversight, and modify the Administrative Law Judge's recommended Order to require Respondent to offer James the wage increase he was promised and to make him whole for any loss of earnings or benefits he may have suffered by reason of Respondent's withholding the wage increase.

In adopting the Administrative Law Judge's conclusion that Respondent violated Sec. 8(a)(3) and (1) of the Act by discharging employees Rufus James and Tommy R. Benson because of their union or other protected activities, Member Jenkins does not rely on the Administrative Law Judge's application of *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), to the facts. That decision concerns indentifying the cause of discharge where a genuine lawful and genuine unlawful reason exist. Where, as here, the asserted lawful reasons are found to be pretextual, only one genuine reason remains—the unlawful one. To attempt to apply *Wright Line* in such a situation is futile, confusing, and misleading.

The Administrative Law Judge properly found that Respondent had previously, in circumstances similar to those facing Benson and Barnes on March 27, sent additional help when requested, or advised that the load be brought back to the warehouse to await more favorable ground conditions. In Benson's case Respondent did neither. Instead, it ordered Benson to make the delivery and held him responsible regardless of the conditions. Further, it is clear that the assessment that Benson and Barnes made against delivering the doors that day was not erroneous. The following day, when Supervisor Kirkland unsuccessfully attempted to make the delivery which Benson and Barnes had failed to make the day before, the truck he was driving became stuck in the mud and had to be towed out. Kirkland, however, was not given an ultimatum to make the delivery, but was instead instructed to return the material to the warehouse.

Respondent cited the above-described incidents involving Benson as the grounds for Benson's discharge. With respect to the first incident it asserts that drivers are wholly responsible for delivering materials in good condition and that Benson failed in this responsibility. Regarding the second incident, Respondent argues that Benson's refusal to deliver the materials was an act of insubordination warranting discharge. As noted earlier, we agree with the Administrative Law Judge's reasons for rejecting this defense.

We find further support for the Administrative Law Judge's reasoning in the timing of the first incident, which came immediately after the election where Benson acted as the Union's observer. The timing of the reprimand to Benson coupled with the failure to warn or in any way discipline Benson's assistant supports the inference that the reprimand was in retaliation for Benson's union activities. Similarly, the difference in Respondent's treatment of Benson and Kirkland regarding the delivery of materials gives rise to the inference that Benson's discharge was discriminatorily motivated. Regardless of whether Kirkland was disciplined for failing to deliver the materials, it is clear that he received vastly different treatment than Benson. Thus, when Benson explained that he could not deliver the materials, he was in effect told to deliver them or be fired. In contrast, when Kirkland failed to make the delivery, he was merely instructed to return the materials to the warehouse. Respondent failed to offer a credible reason for such disparate treatment.

Accordingly, we agree with the Administrative Law Judge that Respondent's discharge of Tommy R. Benson on March 27, 1980, violated Section 8(a)(3) of the Act.

AMENDED CONCLUSIONS OF LAW

Add the following as Conclusion of Law 5 and renumber the remaining paragraph:

"5. Respondent, by withholding the wage increase it promised to Rufus James, because of his union or other protected activities, violated Section 8(a)(1) of the Act."

THE AMENDED REMEDY

As Respondent has been found to have engaged in unfair labor practices, we shall recommend that, in addition to taking those actions recommended in that section of the Administrative Law Judge's Decision entitled "The Remedy," it also takes the specific action set forth below, designed to effectuate the policies of the Act.

Having found that Respondent, in violation of the Act, withheld the wage increase it promised to Rufus James, we will order that Respondent offer him the wage increase he was promised in February 1980, and make him whole for any loss of pay or benefits which he may have suffered by reason of the withholding of his promised wage increase, by payment to him of a sum of money equal to that which he would have earned as a result of the wage increase in the form of wages or other benefits from the date which Respondent improperly withheld the wage increase,[3] with interest thereon to be computed in the manner prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977). See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

Finally, we shall order Respondent to expunge from its records any reference to the discharges that we have found unlawful and to notify each unlawfully discharged employee that this has been done and that evidence of these unlawful acts will not be used as a basis for any future discipline.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board, adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Huttig Sash and Door Company, Atlanta, Georgia, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Add the following as paragraph 2(b) and (c) and reletter the remaining paragraphs accordingly:

[3] Such backpay shall be computed in the manner set forth in *Ogle Protection Service Inc., and James L. Ogle, an Individual*, 183 NLRB 682, 683 (1970).

"(b) Offer Rufus James the wage increase he was promised in February 1980, and make him whole for any loss of earnings or benefits he may have suffered by reason of the withholding of his promised wage increase, in accordance with the provisions set forth in the section of the Board's Decision entitled 'The Amended Remedy.'

"(c) Expunge from its files any reference to the discharges of Rufus James and Tommy R. Benson and notify each of these individuals that this has been done and that evidence of these unlawful acts will not be used as a basis for any future discipline."

3. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT discharge or otherwise discriminate against employees because they join, support, or engage in activities on behalf of Laborers' International Union of North America, Local Union No. 438, AFL-CIO, or any other labor organization.

WE WILL NOT coercively interrogate employees concerning activities on behalf of or sentiments about a labor organization.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them under the National Labor Relations Act.

WE WILL offer Rufus James and Tommy R. Benson immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, and WE WILL make each of them whole for any loss of earnings and benefits each may have suffered by reason of their discharge, with interest.

WE WILL offer Rufus James the wage increase he was promised on February 1980, and WE WILL make him whole for any loss of earnings and benefits he may have suffered by reason of the withholding of his promised wage increase with interest.

WE WILL expunge from our files any reference to the discharges of Rufus James and Tommy R. Benson and notify each of these individuals that this has been done and that evidence of these unlawful acts will not be used as a basis for future discipline.

HUTTIG SASH AND DOOR COMPANY

DECISION

STATEMENT OF THE CASE

SIDNEY J. BARBAN, Administrative Law Judge: This matter was heard in Atlanta, Georgia, on November 12, 1980 (all dates herein are in 1980, unless otherwise noted), before Administrative Law Judge Robert Cohn upon a complaint issued on May 16, based on charges filed on April 9, by Laborers' International Union of North America, Local Union No. 438, AFL-CIO (herein the Union). Administrative Law Judge Cohn died before he could issue a decision in this matter. The Board, after due consideration having remanded this proceeding to the Chief Administrative Law Judge for appropriate action, and no party having requested a hearing *de novo*, the matter was assigned to me for the preparation and issuance of a decision and such other action as may be appropriate.

The complaint alleges that Huttig Sash and Door Company (herein Respondent) violated Section 8(a)(1) of the National Labor Relations Act (herein the Act) by (1) interrogating employees concerning union activities, (2) threatening employees with discharge if they engaged in union activities,[1] and (3) withholding a scheduled wage increase to cause rejection of the Union; and violated Section 8(a)(3) and (1) of the Act by discharging Rufus James and Tommy R. Benson because of their activities on behalf of the Union and other protected concerted activities. The answer to the complaint denies the unfair labor practices alleged, but admits allegations of the complaint sufficient to justify assertion of jurisdiction, and to support a finding that the Union is a labor organization within the meaning of the Act.

Upon the entire record in this case, and, after due consideration of the briefs filed by the General Counsel and Respondent, I make the following:

FINDINGS AND CONCLUSIONS

I. RESPONDENT'S BUSINESS OPERATIONS

Respondent, which has operations in several States, has an office and place of business in Atlanta, Georgia, which is the location principally involved here, where it is engaged in the assembly and wholesale distribution of prefabricated doors and windows. In a recent annual period, Respondent sold and shipped from its Atlanta facility finished products valued in excess of $50,000 directly to customers located outside the State of Georgia.

In its Atlanta warehouse facility, during the times material here, Respondent employed approximately 24 rank-and-file drivers, drivers' assistants (referred to in the

[1] As noted hereinafter, at the end of the General Counsel's presentation of facts, Administrative Law Judge Cohn dismissed the allegation that Respondent violated the Act by threatening employees with discharge.

record as strikers), and warehousemen. The plant manager during the period involved was David Capito (herein Capito) and the two supervisors involved were Richard Taylor (herein Taylor) and Curtis Kirkland (herein Kirkland).

II. THE UNION ORGANIZATIONAL EFFORT

The Union's organizational effort among Respondent's employees was apparently initiated by employee driver Tommy R. Benson (Benson) in early January 1980. An organizational meeting was held at Benson's home on January 12, attended by approximately 17 persons, including Supervisors Taylor and Kirkland. Two days later, the Union filed a petition for certification in a unit of Respondent's employees. Respondent, though admittedly opposed to the unionization of its employees, agreed to the conduct of an election, which was held on March 6. Benson served as the Union's observer at the election. The Union was designated by a majority of the votes cast and was certified as exclusive bargaining representative. Capito testified that, at the time of the hearing in this matter, Respondent and the Union were engaged in collective bargaining.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Alleged Withholding of a Wage Increase*

Rufus James was hired on January 3 as a driver by a supervisor apparently no longer employed by Respondent. He states that he was told at the time of hire that after 30 days (which he understood would be his probationary period) he would receive a raise in pay to that of a regular driver. James was hired at $3.50 an hour. He was told that the regular drivers received from $3.85 to $4. In early February, when he did not receive a raise, James went to see Capito in his office to complain. James states that he told Capito what he had been promised. He says that Capito replied that he was aware of this, but continued, "Rufus, you're not the only one that got burned. I know what was promised to you. . . . Ya'll got the Union coming in and there ain't nothing I can do . . . you just got caught in the middle." James said Capito also stated that "as far as [he] was concerned, [James] had already got [his] increase." In conclusion, James asserts, "I was promised a raise in 30 days and I never did get it."

James' testimony set forth above is not denied, except that Respondent asserts that its probationary period is in fact 90 days. Capito and Respondent's office manager, Rosalyn Williams, testified that, when James and another driver were hired, Respondent had decided that the wage rate for the lowest level of driver would be increased on February 1 from $3.30 to $3.50 an hour, and it was decided to pay these two men at the higher rate from the outset. Williams says that this was done for "convenience." Capito, on the other hand, states that he was informed in discussions with the then plant manager that "this is what it would take to hire . . . these men at this time to get them as truck drivers," which seems to be a more likely explanation. Nevertheless, Williams testified that, on the occasion, she told James what his rate of pay would be, and that "he was getting a bonus in that this was the rate that was going into effect on February 1."

Upon full consideration of these facts, the following appears: Quite apart from whether James was given "a bonus" to induce him to come to work for Respondent, it is clear that he was also at this time promised that in 30 days he would receive a wage increase, which he did not receive. Capito admitted that he was aware that James had been promised the increase, and sought to justify the fact that James did not receive it on the ground that the employees had brought the Union into the picture in the meantime.[2]

For the reasons stated, and upon the entire record, I find that Respondent violated Section 8(a)(1) of the Act by withholding James' promised wage increase because of the employees' union activities.

B. *Alleged Interrogation*

Driver John Barnes testified that, "right before the election," he was told by Supervisor Kirkland that he was wanted in Capito's office. He says that, in Capito's office, the latter asked Barnes if he had "ever been part of a union," to which he says he replied in the negative. Capito continued, asking if Barnes knew how the Union would affect Barnes, his family, and Respondent, saying that "all it does is take money out of your pocket and my pocket and it will be in the best interest [of the Company] if the union is voted down." Barnes testified that he became "kind of frightened, you know, by me being involved with the union. It might affect my job . . ." so he told Capito that he was against the Union, and thought that it would be "voted down."

Capito denied talking to employees individually in his office during that period of time,[3] but on cross-examination appeared to modify somewhat, saying he "did not *at any time I recall* talk to any . . . employee in my office." (Emphasis supplied.)

Barnes' recollection as to the incident seems vivid and specific. Capito's recollection was not so sure and definite. In the circumstances, I credit Barnes.

Respondent makes a point that Barnes testified that he did not tell anyone about this incident. However, from the manner of the questioning, he may have been limiting his answers to the day of the incident and the following day. Indeed, it is likely that Barnes told someone of the incident since the incident came to the General Counsel's attention.[4] In any event, it is sufficient that the incident coerced one of a small number of employees just before the representation election.

On the record as a whole, and for the reasons given, I find that Respondent violated Section 8(a)(1) of the Act

[2] Capito's assertion that James had already received his increase seems like a lame excuse to assuage James' feelings. Thus, after 30 days, most of which time he was a driver on his own, he would still be receiving the same rate which Respondent set for new drivers, rather than the wage increase he had been promised.

[3] Capito says that he was instructed by Respondent's counsel not to do this.

[4] Barnes indicated as much. Thus, when he was asked if he told anybody about the incident on the day after its occurrence, he replied, "No, not *directly* to the employees." (Emphasis supplied.)

by engaging in coercive interrogation of employee activities and sentiment.

C. *Alleged Threat To Discharge*

On February 29, Plant Manager Capito held a meeting in the plant at which he spoke to the employees in opposition to the selection of the Union as their bargaining representative. At this meeting Rufus James asked, in essence, what the employees would gain if they rejected the Union. During the interchange, James complained to Capito "about the over-heavy loads" the employees had to deliver. James said, "We have [trim], windows, insulated doors and windows that a driver and a striker (the driver's helper) has to carry out, and a lot of times like when it's raining and wet you cannot back in. You have to go all the way from the street, down hills, up hills, and it's impossible for two men to get this load off" to which Capito responded that "if [James] didn't like what was going on there, [he] could go and find [himself] another job."[5] James' account of this incident, set forth above, was corroborated by the testimony of John Barnes. Respondent put on no evidence disputing this, though Capito denied, generally, threatening to discharge any employee. However, as has been noted, at the end of the General Counsel's presentation of her case, Administrative Law Judge Cohn dismissed this allegation of the complaint.

Nevertheless, there are numerous decisions of the Board that indicate that such conduct constitutes an implied threat to discharge in violation of the Act. See, e.g., *B. E. & K., Inc.*, 252 NLRB 256 (1980); *Maywood, Inc.*, 251 NLRB 979 (1980); *Padre Dodge*, 205 NLRB 252 (1973). It is unfortunate that counsel for the General Counsel did not inform Administrative Law Judge Cohn at the hearing of the cases on which she was relying. However, I do not think, in the circumstances of this case, that Respondent had adequate opportunity to litigate this issue, and I will therefore recommend that this allegation of the complaint be dismissed.

D. *The Discharge of James*

Rufus James was employed by Respondent on January 3 as a driver. He was discharged on March 3. Respondent claims that James was still considered a probationary employee when terminated; James states that he was not. For the purposes of this decision it would seem of little significance whether James was or was not a probationary employee at the time of his discharge. In the absence of contractual limitation, Respondent is free to discharge employees under any standard it desires, so long as that standard does not violate the Act, or any other applicable statute. In this case, I will assume that James was still considered a probationary employee at the time of his termination.

Respondent's "Payroll Action" record, which was introduced into evidence shows the following reasons, given at the time, for James' discharge: "There were two reasons in the termination. Primarily, he would not work in the warehouse in accordance with instructions from his supervisor. Also, there was an inconsistancy [sic] in the time written in on his clock card when making a trip from Birmingham Alabama in relations [sic] to the time of another truck making the same trip at the same time." However, the testimony of Respondent's witnesses in support of these reasons raise several disturbing questions.

First, as to the trip to Birmingham: On Thursday, February 28, Respondent sent two trucks to make deliveries and pick up loads at Respondent's warehouse in Birmingham, one driven by James and the other by driver Charles Belk. The truck driven by James became disabled on the way down, and, after it was repaired, Belk suggested that James, whose truck was unloaded, proceed back to Atlanta ahead of Belk, whose truck was loaded. Nevertheless, apparently because at one point on the return trip James doubled back to find out what had happened to Belk, Belk arrived at the Atlanta terminal before James. The terminal at that time of night was closed. The next morning, James reported to his supervisor, Taylor, that he had returned to the terminal at 12:30 a.m.

Capito states that he talked to Belk the next day, February 29, to determine when he had returned. Originally, Capito asserted that Belk said that he had returned at 11:30 p.m., then twice testified that Belk said he had returned to Atlanta at 10:30 p.m. According to Capito, he became upset because he felt James was "padding the payroll." Nevertheless, Capito says that he did not talk to James about this on February 29 because, he says, James was out on a delivery that day and he did not see him. This is manifestly inaccurate for Capito spoke with James at least two times on February 29, first during the course of the antiunion speech to the employees, and later in the afternoon, in his office. As detailed hereinafter, Capito discharged James on the following Monday, March 3.

Secondly, as to James' alleged failure to follow instructions concerning work in the warehouse: Though this was stated to be the "primary" reason for James' discharge, it is noted that James was rarely assigned to warehouse work. Since Supervisor Taylor stated that James had done warehouse work about once a month, March 3 was probably only the third time James worked in the warehouse since his employment. There is no evidence of any alleged failure to follow instructions on his part prior to March 3, or that he had been criticized or reprimanded for his work in the warehouse prior to that time.

On the morning of March 3, since James did not have a driving assignment, Supervisor Taylor told him to assist the warehousemen in stacking certain items. When this was completed, James says, the warehousemen sat down, but he picked up a broom and began sweeping the floor. He says that Capito saw him and criticized him for doing this. Capito, on his part, states that on this occasion he saw James walking aimlessly around.[6] After this

[5] That afternoon, when James was in Capito's office for another reason, Capito asked if he had "gotten through" to James. James replied in the affirmative.

[6] Taylor testified that he saw James that morning in the break area drinking coffee. However, he did not speak to James. It also seems clear that he did not speak to Capito about this that morning before James was discharged.

encounter, according to James, whose account is not controverted, the following occurred: Capito left, but after a few minutes came back and said that Respondent would not pay for a meal which James had on his way back from Birmingham on February 28, and James would have to reimburse Respondent for this (James had paid for the meal with expense money Respondent had advanced him). A short time later, Capito again returned, and asked James what time he had arrived back from Birmingham on February 28. When James said that he had returned at 12:30, Capito called him a "liar," which James disputed. Capito thereupon went to the office, got James' paycheck, and terminated James.

There is substantial question, on the record, whether at the time he discharged James, Capito had reason to conclude that James would not follow his supervisor's instructions in the warehouse as claimed on the "Payroll Action" form. Thus, Capito first testified that when he noticed James "walking around aimlessly," he consulted Taylor "to see what [James'] performance was." He says that Taylor replied that "he just didn't feel that James was not performing his job as well as [Taylor] thought he could, nor as well as some. Not as well as he could," and that James was therefore "unacceptable." However, Capito later asserted that, so far as he could recall, Taylor did not "at any time prior to [Capito's] discharging James" inform him "about James not carrying out instructions that morning."[7] Taylor testified that he did not remember telling Capito that James was an unacceptable employee.

Upon consideration of the entire record, I have little confidence in Capito's testimony. I am reasonably certain that at the time he decided to discharge James, Capito was not aware whether James worked well or poorly in the warehouse, or followed instructions or did not, and thus that this asserted delinquency on James' part was an afterthought seized upon to shore up Respondent's asserted reason for terminating James. Indeed, at the hearing, Respondent asserted still a third reason to justify the discharge. This involved the fact that, in early February, a truck which James was driving was damaged, costing Respondent $800 to repair. There is some dispute as to whether James was at fault. Both Taylor and Capito spoke to James about this incident. There is also a controversy as to whether James was, in fact, reprimanded on this occasion.[8] I see no reason to attempt to resolve these disputes. There is no indication that this past incident influenced Capito at the time of the discharge to terminate James. Taylor testified that so far as he was aware James was a satisfactory driver. This incident likewise seems to be another matter put forward after the fact to shore up Respondent's defenses.

I have analyzed the issue of James' discharge in accordance with the Board's decision in *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), as Respondent argues, and I find, first, that the General Counsel clearly presented a *prima facie* case in support of this allegation of the complaint (as Administrative Law Judge Cohn obviously also thought). Respondent was hostile to the Union and wished to defeat it in the election scheduled for March 6. It knew or had good cause to believe that James was actively sympathetic to the Union. Thus, not only had James attended the organizational meeting of the Union, which was also attended by Supervisors Taylor and Kirkland,[9] but also on February 29, in a meeting at which Capito sought to turn the employees against the Union, James made himself *persona non grata* by asking critical questions and making critical comments with respect to Respondent's practices and intentions. This conduct, which not only indicated that James was antipathetic to Capito's campaign against the Union, but, in and of itself, constituted protected activity, raised Capito's ire to the point that he suggested that James terminate his employment. On the next workday, March 3, Capito discharged James for allegedly seeking to be paid for 1 hour more than he was entitled to, calling James a "liar" when he disputed the allegation. The timing of this, shortly before the election, and immediately after James had publicly challenged Capito during an antiunion speech, furnishes strong support for the General Counsel's case.

Under the *Wright Line* analysis, once the General Counsel established a *prima facie* case, the burden shifted to Respondent to show that the discharge was for good cause. Respondent sought to show this by asserting that it had no knowledge that James was a union advocate, which I discredit, and that, in addition to his alleged claim for an extra hour's pay, he also had not followed instructions to work in the warehouse on March 3, and in early February had seriously damaged a truck. However, for reasons previously given, I find that these various reasons are, in fact, pretexts seized upon to justify James' discharge and not the true reason for that action which was clearly his support for the Union and his protected concerted activity.

On the basis of the above, and the record as a whole, I find that Respondent by discharging Rufus James on March 3 violated Section 8(a)(3) and (1) of the Act.

E. *The Discharge of Benson*

Benson was hired by Respondent in January 1978 as a driver. He was discharged on March 22, 1980. He apparently initiated the Union's drive to organize Respondent's employees, and the Union's initial meeting, attended by Supervisors Taylor and Kirkland, was held in Benson's house. Benson was the Union's observer at the representation election held on March 6. I find that Respondent was well aware of Benson's activities on behalf of the Union.

The normal duties of Respondent's drivers, including Benson, involve driving a truck, loaded at the warehouse

[7] Capito also testified that he could not remember the last time Taylor told him that James was "unacceptable."

[8] A lengthy memorandum which Capito says was a "reprimand" was introduced into evidence. However, this was not shown to James. I note that a similar memo involving driver Tommy Benson was shown to him for acknowledgment, which indicates, contrary to an assertion by Capito, that there was a practice of showing written reprimands to the employee

[9] Capito denied that the supervisors informed him about the meeting or the Union. Taylor was not asked about this. Kirkland did not testify. I would infer that in an operation of only 24 rank-and-file employees, with supervisors attending the union meeting, Capito would be sure to be informed of the names of those who attended

by warehouse employees with doors, windows, trim, and the like, to a construction site, where the driver and the assistant riding with him (referred to as a "striker," as previously noted) unload these materials and place them in one of the structures on the site. So far as the record shows, the construction involved is residential, and the doors, windows, and materials are for installation in homes. When the weather is good, the truck is usually backed up to the house at which the material is to be delivered, where one of the two men hands down the materials from the truck to the other who carries them into the house. These items are clearly bulky and frequently rather heavy.

Frequently, probably most of the time, roads, streets, and access to the construction sites are unimproved, and, when it is raining, or the ground is otherwise wet and muddy, the driver and striker have difficulty in making deliveries. As James complained to Capito on February 29, on these occasions, the driver often is unable to back the truck to the home where the materials are to be placed, and the men have difficulty, as James complained, in making deliveries of the "over-heavy" loads from the street to the house where they are to be left. Indeed, the instance in which James is alleged to have damaged a truck, referred to previously, was an occasion in which James became stuck in the mud attempting to make such a delivery and assertedly damaged the clutch and transmission attempting to extricate the vehicle.

According to Capito, he discharged Benson because of two incidents, one on March 6 and a second on March 27, each involving attempts by Benson and a striker to deliver doors and materials when conditions at the construction site were muddy. Capito said that he felt that Benson had become "an unfavorable employee" with respect to the manner he handled material on the job.

On March 6, Benson and a striker delivered to a project certain doors, which Capito testified were "top of the line," designed to be stained by the purchaser at the site. Capito states that later that afternoon he was called by the customer, who complained that a number of the doors were ruined because of mud stains. Capito and Taylor went to the site, where they found that about 10 doors were mudstained along their bottom panels, as if they had been placed in the mud while being carried from the truck to the house. On March 7, Respondent replaced these mudstained doors and had the damaged doors brought back to Atlanta (where they were eventually sold for scrap). Benson was shown the mudstained door and reprimanded. He disclaimed knowledge as to how the doors had become mudstained, and refused to sign a written reprimand, on the basis that he was not at fault.[10] So far as appears, the striker was not reprimanded. Respondent takes the position that the driver on these occasions is responsible for the delivery.

In the second instance, on March 27, Benson was assigned to drive a truckload of doors and trim to a site about an hour away from Respondent's warehouse. On this occasion, Barnes, who was regularly a driver, was assigned as Benson's striker. They left Atlanta in the afternoon, in the rain; when they arrived at the construction site, they found the area muddy and access to the house where they were to deliver the materials obstructed by building material on the ground. Because of the condition of the area and the manner in which the truck had been loaded in Atlanta, Benson stated that he was concerned that, if he tried to get close to the house, he would tip the truck over. The street was at least 20 yards from the house.[11] Because of the weight of the material (though the doors and materials weighed 45 pounds a piece, or less, the total load weighed at least 400 pounds), the condition of the ground through which the materials had to be carried from the truck to the house, and the lateness of the day, Benson and Barnes agreed that they would need help to get the truck unloaded before dark that day.

Both Benson and Barnes testified that it is normal, in circumstances like this, for Atlanta to send additional help, when requested, or advise that the load be brought back to await more favorable conditions; Capito and Taylor do not deny that this has occurred, but assert that it has not happened recently, and rarely occurs. While I am inclined to credit Benson and Barnes on this issue (Taylor and Capito seemed evasive and insincere to me, even on the cold record), but I do not believe the issue need be resolved. Clearly there was precedent for the two men calling for help on which they were entitled to rely.

When Benson called the Atlanta warehouse, however, Capito refused to send assistance, saying that there was no one to send.[12] Benson and Barnes then went back to the construction site and sought without success for a way to get close enough to the house to deliver the materials on the truck. Barnes testified that when Benson told him that Atlanta would not send assistance, he told Benson that he "wasn't going to break my back because they don't want to give me help because the load was too heavy to tote up a slippery driveway and fall." Benson testified that when he called Capito again and told him "what [had] transpired, he [Capito] said, 'That does not make any difference. You are in charge, totally in charge of the vehicle, and it's up to you to see to it that the material is delivered. . . .' I explained the situation again, and I said, 'Send me some help and we'll probably get it off.' He said then, again, 'I tell you, there is no help here in the building . . . you've got an ultimatum. Either get it off or bring the vehicle back and you and Johnny Barnes [can] clock yourself [sic] out or else I will clock you out myself.'" Capito, in his testimony, adds that he told Benson during these telephone conversations, or before, that the customer had insisted on delivery of these materials, threatening to take his business elsewhere. When Benson informed Barnes of Capito's threat to "clock" them out, Barnes responded, "So be it."

[10] According to Benson, the truck was parked partially on the street and partially in the mud. He handed out the doors to the striker, who carried them to the house.

[11] Benson estimated 20 to 60 yards. Capito stated the distance was 60 feet.

[12] When Benson and Barnes returned to Atlanta that day, Benson says that there were several warehousemen standing around. Neither Taylor nor Capito was asked, and neither testified as to whether there were men available that could have been sent.

When the two returned to the warehouse, Capito came out, noted that the men had not delivered the load, went back into the office, secured Benson's checks, and gave them to Benson. Barnes was not discharged or otherwise disciplined.

The following day, Respondent sent Supervisor Kirkland out with Barnes to deliver the load which Benson and Barnes had failed to deliver on March 27. When Kirkland attempted to drive up to the house by a back way the truck became stuck in the mud and a wrecker had to be called to get it out. Respondent instructed Kirkland to return to the warehouse with the load. It does not appear that Kirkland was disciplined. (In his testimony, Capito spoke of both Taylor and Kirkland as both being employed at the time of the hearing.)

I find (as apparently Administrative Law Judge Cohn did) that the General Counsel presented a *prima facie* case that Benson had been discharged discriminatorily, in violation of the Act. Respondent knew that he was prominent in support of the Union, which Respondent opposed. Significantly, there seems to have been no complaint with respect to Benson's work performance until the Union won the election.[13] Yet, Capito seems to have picked out Benson particularly for discipline on each of the occasions noted above. Thus, if anyone were at fault for muddying the doors, in the March 6 incident, it is clear that this must have been the striker. On March 27, the striker refused to assist in delivering the load for fear of injuring himself. Though the circumstances are convincing that Capito was aware of the strikers' conduct on each of these occasions, in each case, Capito disciplined only Benson, without any criticism to the striker. I am not impressed with Respondent's apparent suggestion that the driver alone is responsible to see that the load is delivered. It is manifest that the job cannot be done without the full cooperation of the strikers.

The discrimination against Benson becomes even more obvious in Respondent's treatment of Driver-Supervisor Kirkland. On March 28, the day after Benson was fired for failing to deliver the load, Kirkland and a striker were sent out to deliver the same load. When Kirkland became stuck in the mud, he was directed to return with the load. So far as appears, Kirkland was not disciplined.

Respondent, however, argues that, on March 27, Benson disobeyed a direct order to deliver the materials, and, therefore, was fired for insubordination. There is no question but that Respondent has the right to discharge for insubordination, if that is the real reason for its action. In this case, however, the record as a whole, my concern with the credibility of Capito's testimony generally, and, in particular, the discriminatory treatment of Benson convince me that the reason given was not the true reason for the termination of Benson.

For the reasons given, and upon the entire record, I find that Respondent violated Section 8(a)(3) and (1) by the discharge of Tommy R. Benson on March 27, 1980.

[13] The only prior incident referred to in the record involved a case in which Benson, relying on his striker's misdirections, misdelivered a load of material. This was in the third month of his employment. Benson was discharged, but when he explained the circumstances, was immediately rehired.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent, by coercively interrogating employees with respect to union activities and sentiment, and by withholding a promised wage increase because of union activities among the employees, violated Section 8(a)(1) of the Act.
4. Respondent, by the discharge of Rufus James on March 3, 1980, and the discharge of Tommy R. Benson on March 27, 1980, because of their union or other protected activities, violated Section 8(a)(3) and (1) of the Act.
5. The aforesaid unfair labor practices affect commerce within the meaning of the Act.

THE REMEDY

It having been found that Respondent has engaged in and is engaging in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act, it will be recommended that Respondent cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent discriminated against Rufus James and Tommy R. Benson in violation of the Act, it will be recommended that Respondent offer each of them immediate and full reinstatement to the position each of them held at the time each was terminated or, if such position no longer exists, to a substantially equivalent position, without prejudice to the seniority or other rights or benefits each possessed, and make each of them whole for any loss of pay or benefits which each may have suffered by reason of his discharge, by payment to each of them a sum of money equal to that each of them would have earned as wages or other benefits from the day of his discharge to the date of his reinstatement, less any net earnings during that period, with interest thereon, to be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1971). See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

Upon the foregoing findings of fact and conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I issue the following recommended:

ORDER[14]

The Respondent, Huttig Sash and Door Company, Atlanta, Georgia, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

[14] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(a) Discharging or otherwise discriminating against employees because they join, support, or engage in activities on behalf of a labor organization.

(b) Coercively interrogating employees concerning activities on behalf of, or sentiments about, a labor organization.

(c) Withholding wage increases because of employee activities on behalf of a labor organization.

(d) In any other manner interfering with, restraining, or coercing employees in the exercise of rights protected under Section 7 of the National Labor Relations Act, as amended.

2. Take the following affirmative action which it is found will effectuate the purposes of the Act:

(a) Offer to Rufus James and Tommy R. Benson immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions without prejudice to their seniority or other rights and benefits, and make each of them whole for any loss of earnings or benefits each may have suffered by reason of his discharge, in accordance with the provisions set forth in the section hereinabove entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board, or its agents, for examination and copying, all payroll records, social security payment records and reports, and all other records necessary to facilitate the effectuation of the Order herein.

(c) Post in conspicuous places at its operations in Atlanta, Georgia, copies of the attached notice marked "Appendix."[15] Copies of said notice, on forms provided by the Regional Director for Region 10, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 10, in writing, within 20 days from the date of this Order, what steps it has taken to comply herewith.

IT IS FURTHER ORDERED that the complaint be, and it hereby is, dismissed as to any alleged violation of the Act not found hereinabove in this Decision.

---

[15] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."